ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED
MAR 25 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)))	CC Docket No. 95-185

To: The Commission

DOCKET FILE COPY ORIGINAL

REPLY COMMENTS

BELLSOUTH CORPORATION

JOHN F. BEASLEY
WILLIAM B. BARFIELD
JIM O. LLEWELLYN
1155 Peachtree Street, N.E.
Suite 1800
Atlanta, GA 30309-2641
(404) 249-4445

CHARLES P. FEATHERSTUN
DAVID G. RICHARDS
1133 21st Street, N.W.
Washington, DC 20036
(202) 463-4132

March 25, 1996

No. of Copies rec'd O+9

SUMMARY

BellSouth reiterates herein that Telecommunications Act of 1996 (the "1996 Act") has eliminated any statutory basis for the Commission's "bill and keep" and preemption proposals concerning the compensation for commercial mobile radio service ("CMRS") interconnection with incumbent local exchange carriers ("ILECs"). Not only does the record demonstrate broad-based opposition to a "bill and keep" compensation scheme, the proposal itself is not economically efficient. Specifically, the traffic between CMRS and LEC networks is not balanced, and actual interconnection costs are more than *de minimis*. Further, adoption of a mandatory "bill and keep" policy would be an unconstitutional taking without just compensation. Accordingly, "bill and keep" should not be imposed on either an interim or a long-term basis.

Despite the arguments of several parties, Section 332 of the Communications Act, as amended by the 1993 Omnibus Budget Reconciliation Act, does not *obligate*, or even *authorize*, the FCC to adopt a federal LEC-CMRS interconnection policy or to preempt state regulation. Rather, Section 332 only authorizes the Commission to order the establishment of "physical connections" upon reasonable request, pursuant to Section 201. The section does not address interconnection rates, terms or conditions at all. Instead, these are addressed explicitly by Sections 251 and 252, as adopted by the 1996 Act, which provide a federal framework for interconnection and spell out the respective policy and implementation roles of the FCC and State commissions. Under the new scheme, State commissions are given the primary responsibility for reviewing, arbitrating and approving interconnection agreements.

Because the 1996 Act details the interconnection obligations of carriers, how interconnection charges are to be established, how the costs of interconnection are to be borne, and whether the states or the FCC will have primary jurisdiction over interconnection arrangements, the 1996 Act has superseded or mooted all of the LEC-CMRS interconnection issues raised by the instant rulemaking. Accordingly, BellSouth agrees with commenters urging the Commission to terminate this docket. This proceeding is not required by the 1996 Act and, in fact, contravenes the 1996 Act. Instead, the Commission should dedicate its resources to conducting the many rulemakings that *are* required by the 1996 Act, including a proceeding to promulgate the regulations to implement Sections 251 and 252.

TABLE OF CONTENTS

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Interconnection Between Local Exchange	)	CC Docket No. 95-185
Carriers and Commercial Mobile Radio Ser-	)	
vice Providers	)	

To: The Commission

REPLY COMMENTS

BellSouth Corporation, by its attorneys, hereby replies to the comments submitted in response to the Commission's *Notice of Proposed Rulemaking*, FCC 95-505 (Jan. 11, 1996), *summarized*, 61 Fed. Reg. 3644 (Feb. 1, 1996) (*NPRM*), and *Order and Supplemental Notice of Proposed Rulemaking*, FCC 96-61 (Feb. 16, 1996), *summarized*, 61 Fed. Reg. 6961 (Feb. 23, 1996) (*SNPRM*). In its comments, BellSouth showed that the Telecommunications Act of 1996 (the "1996 Act")[1] has eliminated any statutory basis for the Commission's "bill and keep" and preemption proposals concerning the compensation for commercial mobile radio service ("CMRS") interconnection with incumbent local exchange carriers ("ILECs"). In these reply comments, BellSouth responds to those parties commenting on the FCC's proposed jurisdiction, both prior to and in the wake of the 1996 Act, to preempt state regulation of ILEC-CMRS interconnection arrangements.[2]

---

1 Pub. L. 104-104, 110 Stat. 56 (Feb. 8, 1996).

2 *See NPRM* at ¶¶ 96-114; *SNPRM* at ¶ 6.

II. COMPENSATION FOR INTERCONNECTED TRAFFIC BETWEEN LECS AND CMRS PROVIDERS' NETWORKS

A. Compensation Arrangements

3. Pricing Proposals (Interim, Long Term, Symmetrical)

In the *NPRM*, the Commission relies upon a series of economic studies by Dr. Gerald W. Brock, submitted by Comcast, to tentatively conclude that a "bill and keep" approach should be applied with regard to local switching facilities and connections to end users. *NPRM* at ¶¶ 15, 32-35, 60. Under the proposed "bill and keep" system, neither the CMRS network nor the LEC network would charge the other for interconnection costs associated with the termination of traffic that originated on the other network, and therefore the compensation rate for terminating traffic would be set at zero. *Id.* at ¶¶ 15, 60. As discussed below, not only does the record demonstrate broad-based opposition to a "bill and keep" compensation scheme, the proposal is not economically efficient. Accordingly, BellSouth restates its strong opposition to the adoption of a "bill and keep" mechanism on either an interim or long-term basis.

According to the Brock study relied upon by the Commission, "bill and keep" is economically efficient only if one of two conditions are met: (1) traffic between each network is balanced, or (2) actual interconnection costs are *de minimis*, such that there is little difference between a cost-based rate and a zero rate. *NPRM* at ¶¶ 34, 61; Gerald W. Brock, *The Economics of Interconnection: Incremental Cost of Local Usage*, at 1 (April 1995). BellSouth submits that "bill and keep" should not be imposed either on an interim or a long term basis, since neither of the two conditions described above are satisfied, as shown herein.

On March 20, 1996, BellSouth submitted a study by PNR & Associates[3] that demonstrates that neither of the two asserted bases for imposing "bill and keep" under the Brock analysis has a factual basis. The PNR Study provides the first solid data concerning cellular calling patterns that addresses both the balance of cellular traffic terminated on cellular and landline networks and the time-of-day usage of cellular systems relative to landline networks.[4] Thus, the results of the PNR study go directly to the sustainability of the two conditions Brock posits for "bill and keep."

The PNR Study demonstrates that Brock's first condition for "bill and keep"—balanced traffic—cannot be substantiated. Specifically, the PNR Study shows that:

> Approximately 82 percent of all residential customers' cellular telephone calls are "outgoing" in that they originate on cellular systems and terminate on wireline telephone networks or another cellular system. The remaining 18 percent . . . are "incoming" in that they are received by the cellular customer in question.[5]

Thus, the PNR Study concludes, on this point:

> With respect to the first predicate on which "bill and keep" could be based—that LEC-interconnected CMRS traffic is balanced between incoming and outgoing—the data show that this is not the case. Instead, the data indicate a substantial imbalance between cellular-originated and wireline-originated traffic. Specifically, the data demonstrate that for residential cellular customers the ratio of outgoing to incoming calls is 82 to 18.[6]

---

[3] PNR & Associates, *Cellular Telephone Calling Patterns for Residential Customers* (March 1996) ("PNR Study"), submitted *ex parte* under cover of a letter from Ben G. Almond to the Acting Secretary on March 20, 1996. BellSouth incorporates this filing by reference into the instant reply comments and asks that the Commission consider it fully in reaching its decision.

[4] The PNR Study examined actual calling data from the cellular phone bills of a representative national sample of residential cellular customers.

[5] PNR Study at 1.

[6] *Id.* at 8.

In fact, during the peak cellular calling hour, the PNR Study found that the ratio of outgoing to incoming cellular calls is even higher: "incoming cellular calls constitute only 14 percent of all cellular traffic during the hour of 4:00 p.m. to 5:00 p.m. when total usage of cellular capacity is at its peak. The remaining 86 percent of all total minutes of use during the peak cellular calling hour were occupied by outgoing calls."[7] Accordingly, there is no basis for concluding that there is anything near a balance between cellular-terminated and landline-terminated CMRS traffic, particularly at peak calling hours.

The PNR Study also eliminates Brock's second, alternative, ground for imposing "bill and keep," *i.e.*, that landline-terminated CMRS traffic occurs at hours other than the landline network's peak usage hours, thereby imposing no significant costs on the LEC for termination of such traffic. The study found that peak cellular and landline usage occurs during the same periods of the day, namely late morning (10:00 a.m. to noon) and late afternoon (3:00 to 5:00 p.m.). During these hours, 31.6 percent of all minutes of traffic occurs on LEC networks, and 31.9 percent of residential customers' cellular outgoing traffic occurs during these same hours.[8] The PNR Study concludes:

> With respect to the second predicate on which "bill and keep" could be based—that the cost of terminating CMRS calls on LEC networks is negligible—the data indicate that this too is not the case. . . . The data suggest that this assumption is not valid because the peak hours for both cellular and wireline traffic are similar. The termination of the cellular carrier's peak-hour traffic on the LEC's network occurs during the hours of peak wireline network usage. Accordingly, the termination of cellular-originated traffic by the LEC will cause the LEC to incur incremental costs that cannot be assumed to be *de minimis.*[9]

---

7 *Id.* at 4.

8 *Id.* at 1.

9 *Id.* at 8.

The PNR Study's conclusions are consistent with other data submitted by other commenters. For example, GTE estimates that "approximately 80 percent of the interconnected traffic are calls originated by cellular subscribers that terminate on the LEC's network." GTE Comments at 20. Similarly, according to SBC Corporation, "approximately 80% of all traffic is CMRS to LEC, while only approximately 20% is LEC to CMRS." SBC Corporation Comments at iv; *see* United States Telephone Association ("USTA") Comments at iii; Cincinnati Bell Telephone ("CBT") Comments at 5. The Pacific Telesis Group also demonstrated that in California, "approximately 83% of CMRS traffic originates on the wireless networks and terminates on the wireline networks, while only 17% of traffic flows the other way." Pacific Bell *et al.* Comments at 13. Finally, the National Telephone Cooperative Association ("NTCA") noted that "traffic between cellular and LEC networks will likely not be equal in direction any time soon." NTCA Comments at 9.

Regarding the second Brock criterion, CBT asserts that its interconnection costs are not even close to zero. Although its costs are low, the minutes of use per year number in the millions and interconnection with CMRS providers is thus an important revenue source. CBT estimates that if the current low rates were replaced with a zero rate, a subsidy would be created in favor of CMRS providers, and LECs would be forced to seek recovery of these costs from their subscribers.[10]

Because the Commission's "bill and keep" proposal cannot be justified under either of the two Brock criteria adopted by the Commission, it is not economically efficient and should not be considered further. Nevertheless, since the comments raise a substantial and material question of fact with regard to actual interconnection costs (as well as LEC-CMRS traffic imbalances), the

---

10 CBT Comments at 5; *see* NYNEX Comments at 28-29. In addition, USTA addresses the assumption that the average incremental cost of LEC termination is approximately 0.2 cents per minute. *See NPRM* at ¶ 61. USTA notes that even if this figure were true, it presumes that recovery of only incremental costs will yield sufficient recovery. According to USTA, recovery of only incremental costs may not be adequate. USTA Comments at 23.

Commission must establish a proceeding to develop a full record on this factual issue if it determines to proceed with its "bill and keep" proposal.

The comments filed in this proceeding also demonstrate broad-based opposition to the Commission's "bill and keep" proposal on a variety of policy and legal grounds consistent with BellSouth's initial comments. For example, LECs and various industry representatives opposed the "bill and keep" proposal as an unnecessary solution in search of a problem where the current negotiated interconnection agreements work well, and expressed concern that such a policy would subsidize CMRS at the expense of the LECs and could lead to bypass and higher local service or intrastate access rates. These commenters also noted that traffic flows are not balanced and interconnection costs do not approach zero.[11] Many parties also opposed the proposal to mandate a "bill and keep" compensation scheme as contrary to the 1996 Act, which now occupies the field.[12] In addition, State public utility commissions and others argued LEC-CMRS compensation issues should be decided by the states, particularly in light of the 1996 Act.[13] Finally, paging carriers

---

11 Comments of Ameritech at 5-10; Anchorage Telephone Utility at 1-9; Bell Atlantic at 6-13; BellSouth at 3-13, 18-29; CBT at 4-8; Home Telephone Company at 1-3; Illinois Telephone Association at 1-2; NYNEX at 3-9, 11-19; Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") at 2; Pacific Bell *et al.* at iv-v, 5-21, 24-31, 54-63; Poka Lambro Telephone Cooperative at 2-5; SBC Corporation at 9-12, 20; Smithville Telephone Company at 1-6; U S West at 24-53; Union Telephone Company at 1-4; USTA at 21-24; *see* Comments of John Staurulakis, Inc. at 2-7; Public Utilities Commission of Ohio at 8.

12 Comments of Bell Atlantic NYNEX Mobile at 1-2, 7-16, 18-19; Bell Atlantic at 3-6; BellSouth at 3-13, 18; Concord Telephone Company at 1-2; GTE at 6-10, 36; NTCA at 3-7; NYNEX at 3-9, 11-19; Pacific Bell *et al.* at 92-97; Poka Lambro Telephone Cooperative at 5-6; Puerto Rico Telephone Company at 1-10; SBC Corporation at 6-9; USTA at 15-16; U S West at 28-29; *see* Comments of GVNW at 2; Smithville Telephone Company at 1-6.

13 Comments of California Public Utilities Commission ("California PUC") at 14-16; Cellular Resellers Association at 16-18; National Association of Regulatory Utility Commissioners ("NARUC") at 6-7.

opposed 'bill and keep" for narrowband CMRS because traffic flows for narrowband-type services are predominately one-way.[14]

BellSouth submits that the lack of any economic or factual basis for "bill and keep," together with the substantial policy and legal objections to this policy, render the adoption of the Commission's proposed policy unsupportable. *See Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 767-68 (6th Cir. 1995). There is no valid ground for adoption of a "bill and keep" compensation scheme for LEC-CMRS interconnection even on an interim basis.

---

[14] Comments of Allied Personal Communications Industry Association of California at 8-9; Arch Communications Group at 11-14; Celpage at 6-8; Paging Network, Inc. ("PageNet") at 23-29, 54; Westlink at 1-16.

B. Implementation of Compensation Arrangements

2. Jurisdictional Issues

As BellSouth showed in its initial comments, under the 1996 Act ILEC-CMRS interconnection matters are addressed by the specific provisions of Sections 251 and 252, which provide a federal framework for interconnection and spell out the respective policy and implementation roles of the FCC and State commissions. Under Section 251(d)(3), the Commission lacks the authority to preempt state jurisdiction over LEC interconnection obligations, to the extent a State commission adopts policies that are consistent with the 1996 Act and will not interfere substantially with its implementation. *See* BellSouth Comments at 3-15, 32. BellSouth also demonstrated that even prior to the 1996 Act, the FCC lacked authority to preempt state regulation of LEC-CMRS interconnection, and that neither Section 2(b) nor 332 of the Communications Act authorizes preemption of state regulation over ILEC-CMRS interconnection rates and charges. *Id.* at 32-35.

Nevertheless, several parties have advanced the theory that Section 332, as amended by the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"),[15] obligates the FCC to adopt a comprehensive federal LEC-CMRS interconnection policy and to preempt any contrary state regulation. These parties also assert that the 1996 Act does not abrogate the Commission's authority in this regard. As shown below, these theories do not withstand careful scrutiny and are, in fact, contrary to the intent of Congress.

---

[15] Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 393 (1993).

(a) The 1996 Act establishes an explicit governing model for ILEC-CMRS interconnection which is not inconsistent with Section 332

The Cellular Telecommunications Industry Association ("CTIA") argues that none of the provisions of the 1996 Act, including Sections 251, 252, and 253, "directly addresses LEC-CMRS interconnection," and that to apply these sections to the LEC-CMRS relationship "would effectively strip Section 332 of any meaning." CTIA Comments at 59-60. Similarly, Cox argues that "Section 252 has no particular relevance for any interconnection policy established by this proceeding." Cox Comments at 44. According to CTIA, Section 332(c)(1)(B) provides a jurisdictional basis for the FCC's state preemption proposals contained in the *NPRM* CTIA Comments at 59-64;[16] *see also* AT&T Comments at 21-22.

Section 332(c)(1)(B) states that "[u]pon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201."[17] CTIA argues that this provision, and not Sections 251-253, governs LEC-CMRS interconnection. CTIA further argues that the 1996 Act acknowledges this fact by explicitly preserving the Commission's Section 201 jurisdiction.[18] Thus, according to CTIA, because the 1996 Act does not explicitly preclude FCC regulation, it is implicitly permitted.

---

[16] CTIA also relies upon an analysis attached as an exhibit to its comments by Professor Steven Goldberg of the Georgetown University Law Center entitled "Commission Preemption of Interconnection Rates" (Mar. 4, 1996).

[17] Section 201 states that every common carrier engaged in interstate communication must furnish physical connections with other carriers upon reasonable request when found by the Commission to be in the public interest. 47 U.S.C. § 201.

[18] *See* CTIA Comments at 62. Section 251(i) provides that "[n]othing within [Section 251] shall be construed to limit or otherwise affect the Commission's authority under Section 201." Comcast concurs in CTIA's analysis. *See* Comcast Comments at 43-45.

CTIA's interpretation of Section 332(c)(1)(B) and Section 201 is incorrect. Section 332(c)(1)(B) does *not* extend the scope of Section 201 in general to all aspects of CMRS interconnection. In fact, it extends only one very limited aspect of Section 201(a) to the CMRS field: the power to order a common carrier "to establish physical connections" with a CMRS provider. Prior to this legislation, the FCC lacked authority under Section 201(a) to order a LEC to interconnect its facilities with a CMRS provider for the provision of intrastate service. *See United Telephone Co. of the Carolinas, Inc. v. FCC*, 559 F.2d 720, 724 (D.C. Cir. 1977); *Illinois Bell Telephone Co.*, 59 Rad. Reg. 2d (P & F) 1285, 1287 (1986), *on remand from Rogers Radio Communications Services, Inc. v. FCC*, 751 F.2d 408 (D.C. Cir. 1985); *see also Indianapolis Telephone Co.,* 1 F.C.C.R. 228 (Com. Car. Bur. 1986), *review denied,* 2 F.C.C.R. 2893 (1987). Thus, Section 332(c)(1)(B) established unambiguously the FCC's authority under Section 201(a) to order physical interconnection with regard to LEC-CMRS interconnection.

Section 332(c)(1)(B) did not, however, give the FCC authority over LEC-CMRS interconnection, including the rates for such interconnection. The text of the statute states only that "[u]pon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201." 47 U.S.C. § 332(c)(1)(B). The section also states that except for giving the FCC authority to respond to a request for an order for physical connections for CMRS, it did not "limit[] or expan[d]" the FCC's authority.[19] The statute did not address interconnection rates, terms, or conditions at all. This is significant because the courts have recognized that an order "to establish

---

[19] The legislative history of this provision establishes that Congress' intent was to ensure that the Commission "shall seek to promote" interconnection. *See* H.R. Rep. No. 111, 103d Cong., 1st Sess. 261 (1993). The California PUC said it best when it concluded "[p]romoting interconnection, however, is not synonymous with preempting state jurisdiction over LEC-CMRS intrastate interconnection." California PUC Comments at 20.

physical connections" under Section 201(a) is entirely distinct from the setting of interconnection rates, which is governed by other statutory provisions.[20] *See Lincoln Telephone and Telegraph Co. v. FCC*, 659 F.2d 1092, 1107-09 (D.C. Cir. 1981). A dispute over interconnection rates is *not* the same as a dispute over whether interconnection is to be provided at all. *See Rogers Radio Communications Services, Inc.*, 751 F.2d at 415. Thus, Section 332(c)(1)(B) did not extend anything more than the right to request the FCC to order physical interconnection. That is what the statute says.

Moreover, contrary to CTIA's assertions, the 1996 Act *does* explicitly address the issue of the division of jurisdiction between the FCC and State commissions with respect to ILEC-CMRS interconnection matters. Specifically, Sections 251 and 252 provide a federal framework for interconnection and spell out the respective policy and implementation roles of the FCC and State commissions. As explained in greater detail in BellSouth's initial comments, Section 251 establishes a general duty of telecommunications carriers to interconnect with other telecommunications carriers and establishes specific interconnection requirements for LECs interconnecting with telecommunications carriers, *including CMRS providers*.[21]

---

20 Section 252(a)(1), for example, states that an ILEC "may negotiate and enter into a binding agreement [for interconnection] . . . . [which] shall include a detailed schedule of itemized charges for interconnection and each service or network element to be included in the agreement. The agreement . . . shall be submitted to the State commission [for approval] under subsection (e) of this section." 47 U.S.C. § 252(a)(1).

21 *See* BellSouth Comments at 4-9. The term "telecommunications carrier" is defined as "any provider of telecommunications services." *See* 47 U.S.C. § 153, *as amended by* § 3 of the 1996 Act. The definition of "telecommunications service" — "the offering of telecommunications for a fee directly to the public" — was taken from Senate Bill S. 652, which states that "[t]his definition is intended to include commercial mobile service." S. Rep. No. 23, 104th Cong., 1st Sess. 18 (1995); *see* H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 114-16 (1996). Thus, CMRS interconnection, the subject of this proceeding, is governed by the 1996 Act. In light of this, Cox's position that Section 252 "has no particular relevance to any interconnection policy established by this proceeding" is inexplicable. *See* Cox Comments at 44

Section 252 of the 1996 Act makes voluntarily negotiated interconnection agreements the initial method for setting the charges for interconnection, subject to State review. *See* Section 252(a)(1). Parties who enter into voluntary interconnection agreements are free to adopt virtually any compensation mechanism, which will go into effect unless the State Commission finds that is discriminatory against nonparties to the agreement, that it disserves the public interest, or that it fails to comply with State law. *See* 47 U.S.C. § 252(a)(1), (e)(2)(A), (B), (e)(3). States are given a mediation role where needed. *See* 47 U.S.C. § 252(a)(2). If this process breaks down, however, the States will arbitrate and may impose specific cost-based interconnection arrangements. This interpretation has been embraced in the industry not only by LECs, but also by state commissions and the Cellular Resellers Association.[22]

As noted by the General Services Administration ("GSA"), which filed comments on behalf of the Federal Executive Agencies, Section 252 "conveys to the state commissions the primary responsibility for reviewing, arbitrating and approving the [interconnection] agreements that are negotiated by the LECs." GSA Comments at 11. BellSouth agrees with the GSA's overview of the 1996 Act:

> The Act does not expand the Commission's authority, but rather redefines it. Instead of regulating a specific list of interstate services, the Commission's new role is to establish national policies, procedures and practices governing interconnection of all services among carriers. The state commissions then carry out those policies with respect to individual service agreements. It would therefore be inappropriate for this Commission to attempt to prescribe the form and content of all CMRS/LEC interconnection agreements.

22 *See* Comments of Cellular Resellers Association at 16-18; California PUC at 21-23; Connecticut Department of Public Utility Control ("Connecticut PUC") at 13-14; GTE at 25-27; NARUC at 4-7; NYNEX at 5-10, 43; Pacific Bell *et al.* at 1-5, 92-97; USTA at 15-16; and U S West at 59-60.

Id. at 12.[23] GTE agrees that under the 1996 Act, the FCC can only set "general pricing principles and guidelines." GTE Comments at 27; *see also* Pacific Bell *et al.* Comments at 92 ("The Commission has authority only to adopt voluntary guidelines for states . . . . [but] may not impose mandatory standards on state commissions.").

Even assuming, *arguendo*, that the FCC did have the authority to mandate a particular compensation mechanism, it could not mandate its proposed "bill and keep" policy under the 1996 Act. By imposing on LECs the duty to establish reciprocal compensation arrangements, *see* Sections 251(b)(5), 252(d)(2)(A), Congress clearly contemplated cost recovery for interconnection. *See* Pacific Bell *et al.* Comments at 94. Because "bill and keep" is a zero compensation mechanism, it is permitted under the 1996 Act only under the circumstances established in Section 252(d)(2)(B)(i). Under that section, "bill and keep" is permitted only as a vehicle for the "offsetting of reciprocal obligations" where both parties terminate equivalent amounts of traffic and agree to "waive mutual recovery." *See* Bell Atlantic Comments at 6. A state could, for example, establish through arbitration that the interconnecting parties would charge each other a specified rate, with the parties' charges offset against each other, and permit the parties to waive their mutual charges by agreement in any given month if they found that the cost of measuring their traffic and computing the charges exceeds the net recovery.

Thus, under the scheme envisioned by Congress, the Commission has the authority to order interconnection and to ensure that it is provided, while the states retain jurisdiction over the details of interconnection agreements, including compensation arrangements, under the standards set forth in Sections 251 and 252. *See* Pacific Bell *et al.* Comments at 93. Section 332(c)(1)(B) does not take

[23] The GSA also finds that the 1996 Act does not distinguish between interstate and intrastate calls, and it thus "appears to contemplate that the interconnection agreements approved by the state commissions will apply to all forms of interchanged *[sic]* traffic." GSA Comments at 11.

precedence over the 1996 Act, but instead addresses other matters of importance to mobile service providers. *See* Ameritech Comments at 11; Cellular Resellers Comments at 10; *compare* AT&T Comments at 29.

(b) Section 332(c)(3)(A) does not authorize the FCC to preempt state regulation over interconnection rates and charges

The Communications Act of 1934 created a dual regulatory structure governing communications, whereby regulation of interstate communications is entrusted to the Commission, while intrastate communications are regulated by the states. *See* 47 U.S.C. §§ 151, 152(b). Section 332(c)(3)(A), however, preempted state rate and entry regulation of CMRS as follows:

> Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . . except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

Comcast asserts that the 1993 Budget Act amendments to Section 332 conclusively establish that *all* commercial mobile radio services are jurisdictionally interstate and are regarded as interstate service providers. Comcast Comments at 35, 42; *compare* AirTouch Comments at 48, 51. Thus, in Comcast's view, Section 332 vests the Commission with exclusive jurisdiction over CMRS, including interconnection between LECs and CMRS providers. Comcast Comments at 29-30.[24] Similarly, Cox argues that as a result of the Budget Act, "CMRS is a wholly interstate service and any interconnection to a CMRS provider, regardless of the source, is an interconnection governed by the FCC's interstate jurisdiction." Cox Comments at 38-39.

---

[24] Comcast also cites to the Budget Act amendments to Section 2(b), which now reads "[e]xcept as provided in . . . Section 332," states retain authority over intrastate matters under Section 2(b). 47 U.S.C. § 152(b). Comcast claims this section, in conjunction with Section 332(c)(3)(A), further supports its view that the Commission has jurisdiction over CMRS providers and any interconnection that CMRS providers require of common carriers. Comcast Comments at 31-32; *see also* AT&T Comments at 20-21; Sprint Spectrum and American Personal Communications ("APC") Comments at 37.

Cox and Comcast grossly overstate the effect of the 1993 amendment to Section 332. This section in no way makes all CMRS interstate communications.[25] Rather, CMRS remains predominately intrastate but is exempted from state rate and entry regulation. Indeed, as Comcast recognizes, the same 1993 legislation that amended Section 332 also amended Section 2(b) to reflect that Section 332 contains an exception to the general reservation of state jurisdiction over intrastate communications.[26] If Section 332 had somehow transformed all CMRS into an interstate service, there would have been no need for an amendment to Section 2(b). Moreover, Section 332 expressly reserves states' authority to regulate the terms and conditions of CMRS service and to petition the FCC to regain rate regulation authority when CMRS becomes a substantial local exchange service substitute. Clearly, Congress did not intend to supplant the states in enacting Section 332.

CTIA and others argue that this section's "express preemptive mandates" give the Commission the authority to adopt a "bill and keep" regime[27] for both interstate and intrastate communications markets. *See* CTIA Comments at 68. According to CTIA, Section 332(c)(3)(A)'s "prohibition against state action includes intrastate interconnection compensation charges negotiated between LECs and CMRS carriers" and "necessarily governs state regulation of LEC to CMRS intrastate interconnection rates." *Id.* at 71-72. CTIA also interprets the "other terms and conditions"

---

25 As NYNEX points out, Congress did not 'federalize' all CMRS jurisdiction . . . . Instead, Congress provided for Federal preemption of State regulation specifically only over CMRS rates and . . . market entry." NYNEX Comments at 42.

26 *See* Budget Act, 107 Stat. at 396 (amending 47 U.S.C. § 152(b) to add reference to Section 332).

27 CTIA says it prefers to use the euphemism "reciprocal compensation" instead of "bill and keep." CTIA Comments at 7 n.10. Neither reciprocity nor termination is the issue, however — compensation (or lack thereof) is the issue. No commenter disagrees with the notion that LECs and CMRS providers should reciprocally terminate traffic. CTIA, however, seeks to secure for CMRS providers the right to terminate the vast majority of traffic on LEC facilities without compensation. No euphemism can hide the fact that "bill and keep" would give CMRS providers an enormous handout at the expense of the LECs.

clause in Section 332 to refer only to customer billing information, practices, and disputes. *Id.* at 74-75.[28] Several other parties argue that Section 332(c)(3) supports the Commission's proposal in the *NPRM* that it may preempt state regulatory authority over LEC-CMRS interconnection. *See* AirTouch Comments at 55; Arch Comments at 19; AT&T Comments at 20-21; Personal Communications Industry Association ("PCIA") Comments at 16-17.

The views of CTIA and others regarding the 1993 amendment to Section 332 are not consistent with the plain language of the statute and vastly overstate the effect of the 1993 amendment on the FCC's jurisdiction. The plain language of Section 332(c)(3)(A) states that FCC preemption applies only to the rates charged *by* any commercial mobile service provider to its customers, and not *to* the amount CMRS providers must pay for LEC interconnection. *See* NYNEX Comments at 41; Pacific Bell *et al.* Comments at 97. The Budget Act preempted *only* state regulation of rates charged by cellular carriers and other CMRS providers, and does not extend to the regulation of interconnection matters involving CMRS providers. *See* Cellular Resellers Comments at 6-7; Pacific Bell *et al.* Comments at 98.

NARUC concurs: "Congress intended the preemptive effects of [the Budget Act] to apply only to rates charged consumer end-users of such services." NARUC Comments at 9. Similarly, The Connecticut PUC argues that the Budget Act's "preemption of state regulation of CMRS only extends to entry and rate regulation," and therefore "Congress has not delegated the Commission authority to preempt state regulation of intrastate financial arrangements such as mutual compensation." Connecticut PUC Comments at 2. BellSouth agrees. As previously noted by the

[28] *See also* Celpage Comments at 10 ("It surely can be inferred that the 'rates charged by mobile services' includes interconnection charges assessed on CMRS providers, or charged by CMRS providers."); Sprint Spectrum and APC Comments at 39 (arguing that under Section 332(c)(3)(A), "the Commission has jurisdiction over interconnection rates charged by both CMRS providers and LECs").

Commission, a state regulating the intrastate interconnection rates charged by landline telephone companies is regulating the landline companies themselves, *not* the CMRS providers.[29] Thus, the phrase "rates charged by a commercial mobile service" has no applicability to LEC-CMRS interconnection arrangements."[30]

Similarly, state interconnection policies cannot be preempted on the ground that they might effectively prevent CMRS entry. This "stretches the plain meaning of the statute." Connecticut PUC Comments at 4. As discussed above, the language in Section 332 preempting state CMRS entry regulation refers to the entry of providers into the CMRS marketplace. *Id.*

AirTouch and Comcast assert that the FCC's power to preempt is not curtailed by the 1996 Act, and is, in fact, reinforced by Section 253(e), which states that the application of Section 332(c)(3) to CMRS providers is not affected by the new provisions regarding the removal of barriers to entry in the provision of telecommunications services. AirTouch Comments at 55; Comcast Comments at 34-35; *see* PageNet Comments at 33; PCIA Comments at 26. The simple answer to these commenters is that Section 253(e) has nothing to do with the interconnection provisions of Sections 251 and 252. Section 253 provides for preemption of state laws that impede the introduction of competitive telecommunications services and providers. Section 253(e) makes clear that this does not override the particular limited preemption mechanism contained in Section 332(c)(3)(A) for CMRS, which specifically *allows* states to regulate the "other terms and conditions" of service and provides for reintroduction of state rate regulation under certain

---

[29] *See Petition on Behalf of the Louisiana Public Service Commission for Authority to Retain Existing Jurisdiction Over Commercial Mobile Radio Services Offered Within the State of Louisiana*, 10 F.C.C.R. 7898, 7908 (1995).

[30] BellSouth notes that USTA has argued that Section 332(c)(3)(A) does not apply at all to interconnection, since it deals only with mobile services and interconnection service offered by a LEC is not a mobile service. *See* USTA Comments at 18 & n.17.

circumstances. In the absence of Section 253(e), this limited preemption would arguably be supplanted by the more general preemption in Section 253(a) and (d).

(c) FCC Jurisdiction on the basis of inseverability is not invoked because the interstate and intrastate components of ILEC-CMRS interconnection are severable

CTIA also asserts that Section 2(b) of the Communications Act, 47 U.S.C. § 152(b), provides an alternative basis for FCC preemption under the "inseverability doctrine." That is, while states are generally charged with the regulation of intrastate communication under Section 2(b), in *Louisiana Public Service Commission v. FCC*, the Supreme Court found that where it is "not possible to separate the interstate and intrastate components of the asserted FCC regulation," or when state regulation would "negate" valid FCC regulatory goals, the FCC may preempt state regulation.[31] *See* CTIA Comments at 78; *see also* AirTouch Comments at 44; AT&T Comments at 24-28; PCIA Comments at 19-20; Sprint Spectrum and APC Comments at 44-45. According to CTIA, state traffic termination policies which conflict with reciprocal termination "fall squarely within both the economic and physical inseverability exceptions to the Section 2(b) jurisdictional grant" to the states. CTIA Comments at 82. Similarly, AirTouch asserts that "LEC facilities used for interconnection have no ability to distinguish interstate-originated traffic from intrastate-originated traffic when received from a CMRS MTSO," and therefore FCC preemption is warranted based upon the inseverability doctrine. AirTouch Comments at 48-50; *see* Arch Comments at 20; AT&T Comments at 24-28.

While CTIA is correct that the *Louisiana Public Service Commission v. FCC* decision allows the FCC to preempt state regulation of jurisdictionally mixed facilities to the extent the intrastate and interstate aspects cannot be separated, in the case of LEC-CMRS traffic it is possible to separate

---

31 *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 375 n.4 (1986).

the costs of interconnection and the rates for interconnection. As shown by BellSouth in its initial comments, the jurisdictionally mixed nature of ILEC-CMRS facilities presents no greater impediment to achievement of federal policies than the jurisdictionally mixed nature of other ILEC facilities. BellSouth Comments at 33. The Connecticut PUC makes the same point in its comments when it notes that "the mere fact of joint usage of facilities for interstate and intrastate services does not provide the Commission with the authority to preempt regulation over those facilities, especially when the jurisdictional separations process can accommodate both forms of regulation." Connecticut PUC Comments at 11.

To the extent there is any legal and factual basis for the assertion of FCC jurisdiction over ILEC-CMRS interconnection charges, which is doubtful in light of the 1996 Act, it is possible to use sampling techniques to determine the proportions of interstate and intrastate traffic carried over a given interconnection arrangement, which would permit the application of federally-regulated charges to the interstate traffic and state-regulated charges to the intrastate traffic. BellSouth Comments at 33. The Connecticut PUC also notes that interstate and intrastate traffic can be identified through use of "percent interstate use (PIU)" and "percent local use (PLU)" indicators. Connecticut PUC Comments at 11; *see also* Pacific Bell *et al.* Comments at 101-103.

In any event, the FCC has long recognized that while LEC-CMRS interconnection involves both intrastate and interstate aspects, the intrastate and interstate portions of the interconnection are readily segregable, and preemption of intrastate interconnection rates is therefore not warranted, especially because CMRS is predominantly intrastate.[32] *See* NYNEX Comments at 38-39; Pacific

[32] *See Regulatory Treatment of Mobile Services,* GN Docket 93-252, *Second Report and Order,* 9 F.C.C.R. 1411, 1498 (1994), *recon. in part,* 10 F.C.C.R. 7824 (1995); *Need to Promote Competition and Efficient Use of Spectrum, Declaratory Ruling,* 2 F.C.C.R. 2910, 2912 (1987).

Bell *et al.* Comments at 101. Nothing has changed to warrant reversal of this long-held policy. *See* NARUC Comments at 8; NYNEX Comments at 39.

VI. OTHER

(a) Mandatory "bill and keep" arrangements for LEC-CMRS interconnection would be an unconstitutional taking without just compensation

As shown by BellSouth in its initial comments, the Commission's proposal to mandate "bill and keep" arrangements for LEC-CMRS interconnection on an interim (or other) basis is unconstitutional because it would amount to a taking without just compensation in violation of the Takings Clause of the Fifth Amendment.[33] BellSouth Comments at 18-20. Under the proposed "bill and keep" policy, a LEC would be obligated to utilize its facilities to provide transport and termination of CMRS-originated calls without receiving any compensation for allowing the CMRS-originated calls to transit its network. In *Duquesne Light Co. v. Barasch,* the Supreme Court set forth the "guiding principle" of Takings Clause law respecting public utility regulation:

> [T]he Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory. . . . If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth . Amendment[].[34]

As recognized by a multitude of parties, under the FCC's "bill and keep" proposal, the LEC does not receive *any* actual or imputed compensation for terminating CMRS-originated traffic, regardless of the volume of traffic offered or the investment in physical plant needed to accommodate it. While the government clearly has the authority to regulate the rates charged by public utilities, the Takings Clause does not permit it to require the dedication of facilities and the provision of service without compensation. Therefore, a government-imposed "bill and keep" policy that is not based on offsetting reciprocal compensation is confiscatory and therefore violates

---

[33] U.S. CONST. amend. V, provides, in relevant part: "nor shall private property be taken for public use, without just compensation."

[34] *Duquesne Light Co. v. Barasch,* 488 U.S. 299, 307-08 (1989).

the Takings Clause of the Fifth Amendment. *See* Bell Atlantic Comments at 8-9; GTE Comments at 13-14; Pacific Bell *et al.* Comments at 82-86; U S West Comments at 49-53.

(b) The FCC should terminate this proceeding and concentrate instead on adopting rules to implement the 1996 Act

BellSouth agrees with the commenters who urged the Commission to terminate this docket and, instead, commence a new proceeding to promulgate the regulations required by the 1996 Act.[35] Because the Commission has already stated that it intends to conduct a *separate* interconnection proceeding for purposes of implementing the 1996 Act,[36] continuing the instant rulemaking on the same subject will waste valuable Commission resources, delay implementation of the 1996 Act, and create opportunities for inconsistent decisionmaking concerning implementation of Sections 251 and 252.

As shown above and in BellSouth's initial comments, the 1996 Act details the interconnection obligations of carriers, how interconnection charges are to be established, how the costs of interconnection are to be borne, and whether the states or the FCC will have primary jurisdiction over interconnection arrangements. BellSouth Comments at 4-9. Thus, the 1996 Act has superseded or mooted all of the LEC-CMRS interconnection issues raised in the instant rulemaking. Accordingly, the Commission should terminate this proceeding and devote its resources instead to the completion of the rules implementing of the 1996 Act.

---

35 *See* Bell Atlantic Comments at 6, 14-16; GTE Comments at 42; *see also* Anchorage Telephone Utility Comments at 9; NYNEX Comments at 2; Pacific Bell *et al.* Comments at 1; Puerto Rico Telephone Company Comments at 6; SBC Comments at 1-4, 6-7.

36 *See* "Draft FCC Implementation Schedule for S.652, 'Telecommunications Act of 1996'" (released Feb. 12, 1996).